Supreme Court, U.S.
FILED

961245 FEB 5 1997

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No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Trustee of the Chapter 7 Estate of Southeast Banking Corporation,

Petitioner,

v.

FIRST UNION CORPORATION, a North Carolina corporation and FIRST UNION NATIONAL BANK OF FLORIDA, a national banking association, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After federal regulators closed two Florida banks and First Union purchased the banks' assets from the FDIC, the trustee in bankruptcy for the banks' parent holding company sued First Union in tort and contract, based upon First Union's pre-seizure conduct. No government agency is named as a defendant in the complaint, and none of the claims are based upon governmental acts that would be protected by statutory or common-law immunity. The Eleventh Circuit nonetheless ruled that the trustee's state-law claims against First Union were barred. The question presented is:

In light of this Court's recent decisions restricting federal common lawmaking powers, can governmental immunity be extended, as a matter of federal common law, to a private party that has not acted as an agent of the federal government, thereby barring a plaintiff's state-law causes of action?

LIST PURSUANT TO RULE 29.6

The petitioner has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. The Parties and the Dismissed Complaint 2

B. Proceedings Below 4

REASON FOR GRANTING THE PETITION 7

The Question Presented is Important 8

A. *The Eleventh Circuit's rules of decision.* 8

B. *Judicial restraint in the creation of federal common law.* 13

1. *Constraints on the federal displacement of state law.* 13

TABLE OF CONTENTS
(Continued)

PAGE

2. *Federal common law and matters of private interest.* 16

C. *The Eleventh Circuit's creation of federal common law to displace a state-law cause of action departs from this Court's controlling legal standard and presents a question of great importance to federal-state relations.* 21

CONCLUSION 26

TABLE OF AUTHORITIES

PAGE

CASES

Atherton v. Federal Deposit Insurance Corporation
--- U.S. ---, 117 S. Ct. 666 (1997) 7

Bank of America National Trust and Savings Association v. Parnell
352 U.S. 29 (1956) 17

Barr v. Matteo
360 U.S. 564 (1959) 11, 22

Boyle v. United Technologies Corporation
487 U.S. 500 (1988) 14

Carley v. Wheeled Coach
991 F.2d 1117 (CA3),
cert. denied, 510 U.S. 868 (1993) 16

Citibank, N.A. v. Data Lease Financial Corp.
828 F.2d 686 (CA11 1987) 11

Clearfield Trust Co. v. United States
318 U.S. 363 (1943) 13

D'Oench, Duhme & Co., Inc. v. FDIC
315 U.S. 447 (1942) 20

Doe v. McMillan
412 U.S. 306 (1973) 11

Erie Railroad Co. v. Tompkins
304 U.S. 64 (1938) 13

TABLE OF AUTHORITIES
(Continued)

PAGE

FDIC v. Irwin
916 F.2d 1051 (5th Cir.1990) 6, 8

Golden Pacific Bancorp v. Clarke
837 F.2d 509 (CA D.C.),
cert. denied, 488 U.S. 890 (1988) 8

Gregoire v. Biddle
177 F.2d 579 (CA2 1949) 22

Gutierrez de Martinez v. Lamagno
--- U.S. ---, 115 S. Ct. 2227 (1995) 12

Hess v. FDIC
65 U.S.L.W. 3085 (Jan. 21, 1997) 20

In re Southeast Banking Corporation
93 F.3d 750 (CA11 1996) 10

Mangold v. Analytic Services, Incorporated
77 F.3d 1442 (CA4 1996) 16

Miree v. DeKalb County, Georgia
433 U.S. 25 (1977) 16

Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.
83 F.3d 1317 (CA11 1996) (*en banc*),
vacated and remanded, sub nom.
Hess v. FDIC
65 U.S.L.W. 3085 (Jan. 21, 1997) 20

TABLE OF AUTHORITIES
(Continued)

PAGE

National Bank v. Commonwealth of Kentucky
76 U.S. (9 Wall.) 353 (1869) 19

O'Melveny & Myers v. Federal Deposit Insurance Corporation
512 U.S. 79, 114 S. Ct. 2048 (1994) 14, 21

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
34 F.3d 753 (CA9 1994) 11

Texas Industries, Inc. v. Radcliff Materials
451 U.S. 630 (1981) 13, 25

United States v. Gaubert
499 U.S. 315 (1991) 9, 11

United States v. Kimbell Foods, Inc.
440 U.S. 715 (1979) 14

United States v. Lopez
— U.S. —, 115 S. Ct. 1624 (1995)..... 25

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)
467 U.S. 797 (1984) 10

United States v. Smith
499 U.S. 160 (1991) 12

Wallis v. Pan American Petroleum Corporation
384 U.S. 63 (1966)..... 17

TABLE OF AUTHORITIES
(Continued)

PAGE

Westfall v. Erwin
484 U.S. 292 (1988) 11, 12, 22

Wolfe v. American Savings and Loan Association of Florida
539 So. 2d 606 (Fla. Dist. Ct. App. 1989) 11

STATUTES

28 U.S.C. § 2674 8

28 U.S.C. § 2679 12

28 U.S.C. § 2679(d) 12

28 U.S.C. § 2680(a) 1, 8

28 U.S.C. § 1254(1) 1

688.001, Fla. Stat. (1993) 4

RULES

Rule 12(b)(6), Fed. R. Civ. P. 11

OTHER AUTHORITIES

Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,*
144 U. PA. L. REV. 1245 (1996) 19, 25

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner William A. Brandt, Jr., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-5a) is reported at 93 F.3d 750 (CA11 1996). The opinion of the District Court (App., *infra*, 5a-13a) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 3, 1996 (App., *infra*, 14a-15a), and denied rehearing on November 8, 1996 (App., *infra*, 16a-17a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2680(a):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. Section 2679(b)(1):

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

STATEMENT

A. The Parties and the Dismissed Complaint

The petitioner before the Court is William A. Brandt, Jr., as Trustee of the Chapter 7 bankruptcy estate of Southeast Banking Corporation (Southeast). The respondents are First Union Corporation, its wholly-owned subsidiary First Union National Bank of Florida (collectively, First Union) and the FDIC, which was an intervenor below.

Beset with losses stemming from a weakened local real estate market and other economic conditions, Southeast launched efforts in 1991 to explore a merger or other business combination with a strong financial institution. (App., *infra,* 21a).[1] In March of 1991, Southeast and First

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[1] The facts stated in this petition are taken from the allegations in the dismissed complaint, all of which must be accepted as true on review of the order granting the motion to dismiss.

Union entered into an agreement that contemplated a possible merger or other business combination. Toward that end, Southeast afforded First Union access to confidential and proprietary information. (App., *infra*, 20a-22a). The information obtained by or disclosed to First Union was protected by the agreement's "confidentiality covenant," under which such information was to be used "solely for the purpose of evaluating a possible transaction" with Southeast. (App., *infra*, 21a-22a). The agreement affords Southeast additional protection in the form of a "standstill covenant," which barred First Union from taking certain actions, *e.g.*, acquiring a significant interest in Southeast or hiring key employees, except in the context of a consensual transaction with Southeast. (App., *infra*, 22a-23a).

First Union breached the agreement by using the confidential information it obtained from Southeast to exert influence on federal regulators in order to bring about a rapid, federally-assisted resolution of Southeast's two subsidiary banks, all without Southeast's knowledge or consent. First Union disseminated public statements that further undermined public confidence in Southeast, thus making it more difficult for Southeast to surmount its economic problems without the type of resolution First Union sought. Specifically, First Union used confidential information innocently provided by Southeast in reliance on the confidentiality agreement, presenting both that information and First Union's own subjective analysis of the information to federal regulators in such a way as to further its own undisclosed objective of causing a takeover of the two Southeast banks. As a result of First Union's persistent and persuasive efforts, the regulators became increasingly intransigent and resistant to efforts by Southeast to dispose of certain of its assets at a profit or find other solutions to its financial problems, and finally closed the banks in September of 1991. The FDIC was appointed as receiver, and immediately sold the assets of the banks to First Union. Southeast consequently sustained economic injury that led immediately and directly to its bankruptcy filing and the resulting loss of hundreds of millions of dollars to its creditors, bondholders, and shareholders. (App., *infra*, 18a, 24a-27a).

B. Proceedings Below

Brandt filed a complaint against First Union in Florida state court, alleging the following state-law claims: breach of the confidentiality covenant; breach of the standstill covenant by use of confidential information and records to acquire Southeast or some portion of its assets except in a friendly transaction; breach of Florida's Uniform Trade Secrets Act, § 688.001, *et seq.*, Florida Statutes (1993); trade slander for First Union's false and defamatory public statements about Southeast and its subsidiaries; breach of fiduciary duty arising out of the fiduciary relationship created by the agreement and First Union's commitment of confidentiality; fraud in the inducement based upon First Union's concealed intent to use the information obtained from Southeast under false premises to cause its demise; negligent misrepresentation of First Union's true intent in entering into the agreement; promissory estoppel based upon First Union's promises to Southeast; breach of the implied covenant of good faith and fair dealing arising out of the agreement; and tortious interference with business relationships. (App., *infra,* 33a-50a). The FDIC intervened in the action and secured a removal to federal district court. (App., *infra,* 3a).

Accepting the allegations in the complaint as true for the purpose of ruling on First Union's motion to dismiss, the district court characterized Brandt's claim in this way:

> First Union never intended to abide by the terms of the agreement. It wanted to acquire Southeast Bank, but not by a friendly merger. Instead, First Union hoped to drive Southeast Bank into insolvency, pressure the FDIC to intervene by disclosing the confidential information it obtained from Southeast, and then bid for Southeast Bank's assets while in receivership. As First Union would have access to confidential information that other bidders would not, it could determine with much greater accuracy Southeast Bank's value. With that information, First Union could easily outbid the other bidders—which would have to account for value uncertainties in their bids—

> while still paying much less than it would if it purchased shares in Southeast Corp. pursuant to a friendly merger. Finally, this type of acquisition would free First Union from certain other conditions a friendly merger agreement might impose.
>
> In accord with the whole design, First Union investigated the confidential records of Southeast Bank, all the while assuring Southeast that its only intention was to investigate a friendly merger. Using this information, it then: 1) Issued "defamatory" press releases to undermine confidence in Southeast Bank (and thus, undermine both its solvency and the likelihood of its finding another friendly merger partner); 2) Urged lenders to call in outstanding Southeast Bank debt; and 3) Pressured the FDIC into rejecting other Southeast Corp. merger proposals, declaring Southeast Bank insolvent, and intervening. After the intervention, First Union made the winning bids for the Southeast Bank assets it desired, and because Southeast Bank went into receivership, the share value of Southeast Corp. dropped dramatically.

(App., *infra,* 7a-8a). The district court, however, dismissed the complaint by ruling that, while the original agreement was between Southeast and First Union (the two holding companies), and the two Southeast banks had never been parties to that agreement, the nature of the injuries caused by First Union's contractual breaches and tortious acts, which injuries included a diminution in the value of Southeast's stock in its subsidiary banks, established that the claims were derivative rather than direct. Accordingly, the district court held that the claims belonged to the FDIC, as receiver for the banks, and not to Brandt, as trustee for Southeast. (App., *infra,* 9a-13a).

On Brandt's appeal, the Eleventh Circuit affirmed the dismissal on an entirely different ground—that Southeast was completely barred from bringing its state-law cause of action against First Union as a corollary of the statutory bar

to an action against the federal government arising from the takeover of Southeast. (App., *infra,* 1a-5a).

The court of appeals acknowledged the allegations in the complaint that the injuries had been caused by First Union's pre-seizure breaches of contractual obligations and tortious conduct, but nonetheless ruled that the action was barred as a matter of law by the federal determination of insolvency. (App., *infra,* 4a). Extending precedent decided under the "discretionary function" bar of the Federal Tort Claims Act, the court ruled that Southeast was barred from bringing its state-law claims against First Union:

> [B]eing unable to sue federal regulators for their discretionary act of closing the bank, the Holding Company instead claims that the closure was precipitated by First Union's disclosures of confidential information to the federal regulators. Nevertheless, "*[o]nly* the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damage [alleged to have occurred by First Union] without the ultimate declaration of insolvency." *FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir.1990). The Comptroller's decision is not an act for which First Union can be held liable. *See id*, at 1053-56.
>
> The Holding Company is attempting to do what it otherwise could not do, sue for its damages as a result of the government's alleged improper closure of Southeast Bank. * * *. They have couched their suit in terms of the timing of the regulators' decision to close the bank, that is, that because of First Union's prompting the government officials decided to close the bank sooner than otherwise would have occurred. But underlying this claim (and throughout their complaint) is the Holding Company's belief that Southeast Bank was solvent and should not have been closed by federal regulators. Despite these efforts, the Holding Company cannot sue for the discretionary act of federal

> regulators in closing the bank. Nor can they sue First Union for "precipitating" the government's ultimate action by disclosing information the government was entitled to have.

(App., *infra,* 4a-5a).

REASON FOR GRANTING THE PETITION

In *Atherton v. Federal Deposit Insurance Corporation,* --- U.S. ---, 117 S. Ct. 666 (1997), decided on January 14, 1997, the Court reaffirmed and revitalized the precept that only in "few and restricted" instances may the federal courts create "federal common law" rules of decision and thereby displace state law. 117 S. Ct. at ---- (slip opinion at 4). "[W]hen courts decide to fashion rules of federal common law, 'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law * * * must first be specifically shown.'" *Id.* at 5 (citation omitted). The Eleventh Circuit's decision in this case has cut off an action that brings *state-law claims* against a *private entity* which, without question or dispute, was *not* acting as an agent of the federal government in committing the contractual breaches and torts that gave rise to the state-law causes of action. Neither constitutional nor statutory authority, nor any significant federal policy or interest, compelled the creation of such a rule of decision; and, indeed, no such authority, policy or interest was relied upon by the court. Rather, the Eleventh Circuit created a federal common-law rule of decision, in contravention of the strict limitations on a federal court's power to promulgate "federal common law" that displaces state-law rules of decision. The disharmony among the precedents on this important issue of federalist principles commends this matter to the Court's attention on certiorari.

The Question Presented is Important

A. *The Eleventh Circuit's rules of decision.*

According to the Eleventh Circuit, the bar to an action by Southeast against the *federal government* "for its damages as a result of the government's alleged improper closure of Southeast Bank" *also* extinguishes *all* state-law claims against First Union based on breaches of contractual agreements and tortious acts that occurred months *prior to the government's takeover* of Southeast and First Union's simultaneous purchase of Southeast's assets. Because Southeast "cannot sue for the discretionary act of federal regulators in closing the bank," its cause of action against First Union also disappears. (App., *infra*, 4a-5a)

No constitutional or statutory authority for this holding is cited in the decision, and none exists. The Fifth Circuit's decision in *FDIC v. Irwin*, 916 F.2d 1051 (CA5 1990)—the *sole* authority cited by the Eleventh Circuit in support of its holding—was decided under the Federal Tort Claims Act (FTCA), which act establishes a limited waiver of federal sovereign immunity, 28 U.S.C. § 2674, while conferring immunity on *governmental officials and employees* acting within the scope of their "discretionary functions." 28 U.S.C. § 2680(a) ("[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). *Irwin* holds *only* that the Comptroller of the Currency is immune from liability under Section 2680(a) for a decision to close a bank that has been determined to be insolvent. 916 F.2d at 1053-54.[2] The "discretionary function" exception, "when

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[2] The first decision by a court of appeals to apply the "discretionary function" exception to a federal bank takeover was *Golden Pacific Bancorp v. Clarke*, 837 F.2d 509 (CA D.C.), *cert. denied*, 488 U.S. 890 (1988). In that case, the bank challenged the Comptroller of the Currency's declaration of insolvency and imposition of a receivership under the FTCA, seeking money damages because "the Bank

(continued ...)

properly construed * * * 'protects only *governmental actions and decisions* based on considerations of public policy.'" *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (emphasis added; citation omitted); *accord, United*

(... continued)
was in fact solvent and * * * had sufficient liquidity to meet depositors' demands." 837 F.2d at 88. The court applied the "discretionary function" exception:

> [T]he actions complained of here seem the very paradigm Congress had in mind in fashioning the exception. Congress has given the Comptroller broad authority to ensure that all national banks follow safe and sound banking practices. * * * [S]urely the decision to close the Bank—made after a week of examination and in the face of a run of withdrawals—could not possibly be thought of as other than a discretionary act that was committed by Congress to the Comptroller's judgment. * * * The Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices—judgments that draw upon a mix of law, accounting, bank custom and policy. Sometimes, as here, those determinations must be made under grave pressure and expeditiously. The government is not liable in damages merely because in a particular case the Comptroller's conclusion or some aspect of it turns out to be legally vulnerable.

Id. at 512 (citations and footnote omitted). In *Irwin*, the *Comptroller's bank closure* was challenged in an FTCA action on the theory that "the examiner reached his insolvency determinations based on personal animosity rather than the bank's financial condition." 916 F.2d at 1053. The Fifth Circuit held that "Congress intended to shield the Comptroller's insolvency determinations from tort liability," relying on the authority conferred on the Comptroller by the controlling federal statutes. *Id.* at 1054.

States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984).

In this case, *Southeast did not sue the government or any government official*; its action was brought *solely* against First Union, based on First Union's contractual breaches and tortious acts.[3] Neither *Irwin* nor any other reported decision has ever *contemplated,* much less approved, the application of the "discretionary function" exception to cloak *a private entity* with federal governmental immunity merely because the federal government closed a privately-owned corporation for insolvency.

What the Eleventh Circuit has done is to import a *statutory concept* of governmental immunity into *federal common law,* and to use that judge-created principle and extension as the dispositive rule of decision, thereby displacing *state* law—under which there is *no* legal bar to

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[3] The Eleventh Circuit's remark that Southeast "half-heartedly recognizes its inability to sue federal regulators for their decision to close the bank" (App., *infra,* 4a), is off the mark. Responding to First Union's reliance on *Irwin,* Southeast firmly and positively stated that the action in *Irwin* had challenged "the OCC's exercise of its authority to seize the bank; here, First Union's conduct—as alleged in the complaint—*was that of a predatory private entity* that was looking to destroy a weakened competitor and thereby appropriate its assets." Reply Brief of Appellant/Brief of Cross-Appellee at 22-23, *In re Southeast Banking Corporation,* 93 F.3d 750 (CA11 1996) (emphasis added). Here, no claim has been asserted against any party, governmental or private, based on the intervention or sale of the two Southeast banks, and that intervention and sale are not being challenged in any way. The claims against the private party defendant are based solely on actions that *preceded* the governmental intervention and subsequent sale. Indeed, had there been no intervention and sale, these same claims could well have been asserted by Southeast against First Union, based on the written agreement and the dealings between the two holding companies.

Southeast's direct action against First Union. *See e.g., Citibank, N.A. v. Data Lease Financial Corp.*, 828 F.2d 686, 694 n.11 (CA11 1987); *Wolfe v. American Savings and Loan Association of Florida*, 539 So. 2d 606, 607 (Fla. Dist. Ct. App. 1989).[4] This creation of federal common-law immunity for a private party that is not acting as an agent for the federal government runs directly counter to this Court's stringent rules on the exercise of the federal common lawmaking power, and goes well beyond any existing precedent.

The paradigm of a proper invocation of the federal power to create common law that displaces a state cause of action is, of course, this Court's creation of the "official immunity" doctrine for *federal officials*, under which doctrine immunity is extended for discretionary acts of federal officers. *Westfall v. Erwin*, 484 U.S. 292 (1988); *Doe v. McMillan*, 412 U.S. 306, 319 (1973); *Barr v. Matteo*, 360 U.S. 564, 570 (1959). The Court was empowered to act in this field because "the scope of absolute official immunity

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[4] As noted earlier, the case was before the Eleventh Circuit on a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the court correctly noted its obligation to accept Southeast's allegations as true. (App., *infra*, 3a). *E.g., United States v. Gaubert*, 499 U.S. at 327. Thus, it was *only by creating a bar to the action as a matter of federal common law* that the Eleventh Circuit was able to sustain the dismissal. The question whether Southeast would ultimately be able to sustain the allegations that First Union's contractual breaches and tortious acts were the cause of the injuries set forth in the complaint is, under long-standing precedent, not subject to resolution under Rule 12(b)(6) where, as here, the complaint expressly pleads causation. *See, e.g., Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.3d 753, 756 (CA9 1994) (question whether injuries were caused by alleged civil rights violation, as claimed by plaintiff, or by federal injunction, as asserted by defendant, improperly decided on motion to dismiss; "a question of causation is preeminently a question of fact, to be decided after trial") (citation omitted).

afforded federal employees is a matter of federal law, 'to be formulated by the courts in absence of legislative action by Congress.'" *Westfall v. Erwin*, 484 U.S. at 295 (citation omitted).[5] Federal officers' immunity from state civil lawsuits uniquely and critically serves federal interests:

> The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits.

Id. at 295 (citations omitted).

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[5] The common-law "official immunity" doctrine has been overridden by Congress' passage of the Westfall Act, 28 U.S.C. § 2679, in 1988, in which Congress intended to "delete the 'discretionary function' requirement" and thereby "return Federal employees to the status they held prior to the *Westfall* decision." *Gutierrez de Martinez v. Lamagno*, --- U.S. ---, 115 S. Ct. 2227, 2232 (1995) (citing legislative history). Section 2679(b)(1) provides that all civil actions for money damages against federal employees are barred except for those that may be brought under the FTCA. 28 U.S.C. § 2679(b)(1). Subsection (d) of the statute provides that actions against federal employees may proceed only upon certification that the defendant employee was acting within the scope of employment at the time of the incident giving rise to the cause of action; upon such certification, the United States is to be substituted for the named defendant (and, if the action was initially brought in a state court, removal to federal court is required). 28 U.S.C. § 2679(d). Both the Congress and the Court have recognized that this substitution may well lead to imposition of a complete bar to the action where, for instance, the "discretionary function" exception of Section 2680 applies. *United States v. Smith*, 499 U.S. 160, 166-67 (1991).

The question that is presented to the Court by the Eleventh Circuit's decision in this case is whether the power to create federal common law that enabled this Court to create a doctrine of federal immunity to protect government officials can be extended to an action against a private entity that was indisputably *not* acting as an agent of the federal government. Answering this question calls onto the field the most rudimentary principles of federalism and cardinal limits on the power of the federal courts to create federal common law.

B. *Judicial restraint in the creation of federal common law.*

1. *Constraints on the federal displacement of state law.*

The Court has taken great pains to implement a strict regimen in the field of federal common law. Beginning with the adjuration that "[t]here is no federal general common law," *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938), the Court has allowed federal common lawmaking, in the sense of judge-created law that is independent of any constitutional or statutory imperative,

> only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 641 (1981) (footnotes omitted). The archetypal instance in which the "rights and obligations" of the United States are involved is *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), in which the Court declared the primacy of federal common law governing the issuance of, and transactions in, the federal government's commercial paper in an action brought by the federal government to recover on an express guaranty. *Id.* at 367.

Except in such a clear-cut instance of a federal duty that arises from the Constitution or a specific Act of Congress and that is executed as part of "nationwide federal

programs," *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-28 (1979), the Court historically has trod with great care. When the "rights and obligations of the United States" have been asserted as the justification for creating federal common law and, as here, for thereby overriding substantive state law, the most stringent restrictions are called into play, as this Court reaffirmed in *Atherton v. FDIC*:

> The Court has said that "cases in which judicial creation of a special federal rule would be justified * * * are * * * 'few and restricted.'" "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "'Congress acts * * * against the background of the total corpus juris of the states * * *.'" Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law * * * must first be specifically shown." Indeed, such a "conflict" is normally a "precondition."

117 S. Ct. at — (slip opinion at 5); *accord, O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79, 114 S. Ct. 2048, 2055 (1994). Only in such "extraordinary cases" is "the judicial creation of a federal rule of decision warranted." *Id.* at 2056.

Westfall was such a case, but *only* because "the scope of official immunity afforded federal employees is a matter of federal law, 'to be formulated by the courts in the absence of legislative action by Congress.'" 484 U.S. at 295. So too was *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), in which the Court created its most far-reaching rule of common-law official immunity, extending immunity to a military contractor engaged in the performance of government work. In that

decision, the Court stressed the limits of the federal common-law power:

> In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law. But we have held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."

487 U.S. at 504 (citations omitted).

The identification of "an area of uniquely federal interest * * * merely establishes a necessary, not a sufficient, condition for the displacement of state law." 487 U.S. at 507. The requisite conflict between federal policy and state law *must* be demonstrated before federal common lawmaking may proceed:

> Displacement will occur only where * * * a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," or the application of state law would "frustrate specific objectives" of federal legislation. * * * Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. But conflict there must be * * *.

Id. at 507-08 (citations omitted).[6]

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[6] In *Boyle*, the Court held that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at

(continued ...)

2. *Federal common law and matters of private interest.*

The rule is straightforward: "where 'litigation is purely between private parties and does not touch the rights and duties of the United States,' federal law does not govern." *Boyle*, 487 U.S. at 506 (citation omitted). This Court's decisions have vigilantly eschewed the creation of federal common law to govern private disputes such as the one in this case.

Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977), which was cited in *Boyle* as the "opposite extreme," 487 U.S. at 508, perhaps best illustrates the Court's wariness. There, plaintiffs who had been injured in an aircraft accident sued the county, seeking to impose liability on the county as third-party beneficiaries of a

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(... continued)
505-12. That decision has been applied by the courts of appeals where the federal government has delegated its discretionary governmental functions to government contractors. *E.g., Mangold v. Analytic Services, Incorporated*, 77 F.3d 1442, 1447-50 (CA4 1996) (government contractor immune from libel action based on statements made during investigation into alleged fraud; court also relied on immunity that is extended to witnesses who give testimony to public prosecutors); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1121-24 (CA3) (*Boyle* rationale "is equally applicable to military and nonmilitary contractors"; private contractor "who is compelled by a contract to perform an obligation for the United States" is extended immunity when the delegation by federal government concerns a "discretionary function"), *cert. denied*, 510 U.S. 868 (1993). While there is a split among the circuits on this question, *Carley v. Wheeled Coach*, 991 F.2d at 1119 n.1, 1123-24 (collecting cases), *no court* has extended *Boyle* to afford immunity to a private party whose alleged liability arises from conduct that is wholly separate and apart from a contractually-delegated discretionary governmental function—which is *precisely* what the Eleventh Circuit did in this case.

contract between the county and the Federal Aviation Administration (FAA). 433 U.S. at 26-27. The basis of the claim was that the county had breached its contractual duty to restrict the use of lands near the airport "by owning and maintaining a garbage dump adjacent to the airport, and that the cause of the crash was the ingestion of birds swarming from the dump into the jet engines of the aircraft." *Id.* at 27. The question before the Court was whether the interests of the United States were such as to bar the action against the county because the county's duty arose from its federal contract. *Id.* at 28-29.

The Court recognized that "[t]he operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude," but found

> no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts * * *.

433 U.S. at 30. "Since only *the rights of private litigants*" were at issue, the Court disdained its federal common lawmaking power, ruling that "whether petitioners may sue respondent does not require decision under federal common law since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome." *Id.* at 31-32 (emphasis added); *accord, e.g., Wallis v. Pan American Petroleum Corporation,* 384 U.S. 63, 68-69 (1966) (federal law does not govern the rights of private parties in an oil and gas lease issued under the federal Mineral Leasing Act; Court found "no significant threat to any identifiable federal policy or interest").

In *Miree,* this Court relied on *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29 (1956), to support its ruling that federal common law was inapposite. *Miree,* 433 U.S. at 30-31. *Parnell,* which foreshadowed this Court's most recent precedent, speaks directly to the utter impropriety of imposing

federal common-law rules of decision in the dispute between Southeast and First Union.

Parnell arose from an action for conversion of the petitioner bank's government bonds. 352 U.S. at 30-31. The specific question before the Court was whether state law, under which the burden was on the defendants to show their good faith, or federal common law, under which the burden was on the bank, applied to the trial of the lawsuit. *Id.* at 31-32. The Court reaffirmed *Clearfield Trust*, but distinguished between the federal interest that predominated in that case and the completely private nature of the dispute in *Parnell*:

> Securities issued by the Government generate immediate interests of the Government. * * * But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States * * *.

Id. at 121.

Applying the precepts of *Parnell*, the decision in *O'Melveny & Myers* refused to impose federal common-law rules in an action brought by the FDIC as receiver against the former counsel to a failed financial institution. Treating the FDIC as a private party (because only the rights of the failed institution were at issue), 114 S. Ct. at 2053, the Court reiterated that federal common lawmaking is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law,'" and that such conflict is "a precondition for recognition of a federal rule of decision." *Id.* at 2055 (citations omitted). Rejecting the FDIC's request for creation of a federal common-law rule on the question whether the knowledge of corporate officers would be imputed to the FDIC as receiver, the Court held:

> What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of

> decision at issue here *do not govern the primary conduct of the United States or any of its agents or contractors,* but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct *on the part of private actors* that has already occurred * * *.

Id. at 2055 (emphasis added).[7]

The Court's most recent exploration of its federal common lawmaking power was in the *Atherton v. FDIC* decision. There, the Court was called upon to decide whether state or federal law governed in a state-law action brought by the former Resolution Trust Corporation (RTC) and specifically, the standard of care applicable to the tortious conduct alleged in the complaint. 117 S. Ct. at --- (slip opinion at 2-3).[8] In strong language, the Court rejected the notion that federal common law must be applied "simply because the banks in question are federally chartered," exacting compliance with the controlling rule of law—first announced in 1870—that "federally chartered banks are subject to state law." *Id.* at 9. Quoting *National Bank v. Commonwealth of Kentucky,* 76 U.S. (9 Wall.) 353 (1869), the Court held that federal banks

> are subject to the laws of the State, and are governed in their daily course of business

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[7] At least one commentator read *O'Melveny & Myers* as having "appeared to employ a stricter approach to 'federal preemption' of state authority." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,* 144 U. PA. L. REV. 1245, 1363 (1996). The decision was seen as indicative of an inclination "to impose a 'federal common law' rule only when state power over the matter in question is clearly lacking and when adoption of a 'federal common law' rule does not require federal courts to engage in the 'weighing and appraising' of competing policy considerations more appropriately left to the legislative and executive branches." *Id.* at 1368.

[8] As in *O'Melveny & Myers,* the Court treated the FDIC (successor to the RTC) as a receiver only. *Id.* at 6.

> far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is *only* when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

117 S. Ct. at — (slip opinion at 9). Thus, "[t]o point to a federal charter by itself shows no conflict, threat, or need for 'federal common law;'" absent "a need to create federal common law arising out of a significant conflict or threat to a federal interest," that state law governs in a tort action brought on behalf of a failed financial institution. *Id.* at 10-11.[9]

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[9] On January 21, 1997, the Court vacated and remanded another recent Eleventh Circuit common lawmaking decision for reconsideration in light of *Atherton. Hess v. FDIC,* 65 U.S.L.W. 3085 (Jan. 21, 1997). The vacated decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.,* 83 F.3d 1317 (CA11 1996) (*en banc*), *vacated and remanded, sub nom. Hess v. FDIC,* 65 U.S.L.W. 3085 (Jan. 21, 1997), addressed the question whether the doctrine of *D'Oench, Duhme & Co., Inc. v. FDIC,* 315 U.S. 447 (1942), survives as a valid federal common law rule in the aftermath of Congress' enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. 83 F.3d at 1328-30.

C. *The Eleventh Circuit's creation of federal common law to displace a state-law cause of action departs from this Court's controlling legal standard and presents a question of great importance to federal-state relations.*

In the absence of a federal statutory proscription that bars a lawsuit against a private entity whose contractual breaches and tortious acts are alleged to have caused injuries to the holding company of institutions subsequently taken over by the government, the Eleventh Circuit simply declared that an insolvency determination by federal regulators *absolutely bars* such an action. (App., *infra,* 4a-5a). This holding, it is submitted, is yet another demonstration of "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially construed) federal policy." *O'Melveny & Myers,* 114 S. Ct. at 2055. Southeast has *never* sought to impose liability for the takeover on a federal official or any agent of the federal government.[10] This cause of action is brought against a *private entity* for contractual breaches and tortious acts, all of which occurred *prior* to the regulatory closure of the banks, and all of which would have been the subject of viable state-law claims even if the two Southeast banks had never been intervened or sold.

The Eleventh Circuit appears to have gone astray in significant part because of its misconstruction of the basis for, and ramifications of, the immunity that extends to federal regulators in connection with a bank closure for insolvency. The official immunity that is conferred by statute for the exercise of discretionary governmental functions does *not* impose an imprimatur of correctness on the regulatory determination. To the precise contrary, the

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[10] This is true both directly and indirectly: the FDIC has no indemnity obligation to First Union that relates to Southeast's claims against First Union.

rationale for such immunity is simply that "the threat of liability will make federal officials unduly timid in carrying out their official duties," *Westfall v. Erwin,* 484 U.S. at 295, and that even *mistakes* must be protected from legal challenges:

> The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action *which may turn out to be founded on a mistake,* in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors * * *.

Barr v. Matteo, 360 U.S. at 571 (quoting Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949)).

Official immunity thus "comes at a great cost" because "[a]n injured party with an *otherwise meritorious tort claim* is denied compensation simply because he had the misfortune to be injured by a federal official." *Westfall v. Erwin,* 484 U.S. at 295 (emphasis added). It does no violence to the immunity accorded to federal regulators for the closure of the two Southeast banks to allow Southeast to press a claim that might include evidence of the bank's actual solvency at the time of the closure; certainly, the Eleventh Circuit had no doctrinal basis for treating the regulators' determination as carved in granite for the purposes of a lawsuit against a private party. Instead, allowing an action to proceed against the private tortfeasor honors "the basic tenet that individuals be held accountable for their wrongful conduct." *Id.*

The particular injustice that will be worked by the Eleventh Circuit's opinion is exemplified by the precise allegations of the Trustee's complaint. Far from merely alleging, in the lower court's words, that "First Union leaked financial information concerning Southeast Bank to bank regulators resulting in the closure of the bank," (App., *infra,* 3a), the Trustee specifically claimed that First Union's tortious actions and breaches of its contractual responsibilities debilitated Southeast's efforts "to surmount its economic problems." (App., *infra,* 24a-27a). The damages from these torts and contractual breaches are alleged to have occurred, at least in part, *prior* to the government takeover; yet, under the panel's reasoning, the "hip-pocket" immunity conferred under the "discretionary function" exception *reaches back to immunize tortious conduct of a private party that occurred months before the government takeover* of the bank. The message thus broadcast to would-be predators is that their tortious conduct—when it succeeds—will thereby be immunized, with potential liability *only* if the predatory institution *fails* in an effort to foster an unwarranted takeover of its prey.[11]

For that matter, if First Union had used a different means to achieve its goal, and had injured Southeast by, for example, breaking a contract to buy shares in Southeast and its two banks or to lend money to Southeast to recapitalize those banks, the Eleventh Circuit's reasoning would *require* that First Union be immunized against liability for those

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[11] The practical implications for the banking sector of the Eleventh Circuit's ruling should also not be overlooked. If struggling bank holding companies hesitate to reach out for assistance through possible mergers or other joint arrangements because those institutions with whom they share confidential information will be protected from the consequences of wrongful conduct in the event of a government takeover of the holding company's banks, the inevitable consequence will be that such holding companies will be more reluctant to take the risk of exploring private arrangements. The government, in turn, will be forced to take over institutions that otherwise might have been saved by the private sector—all at greater taxpayer expense.

breaches as well—because the *final* injury to the two Southeast banks was "caused" by a federal government takeover. Any damage caused to a bank holding company and its banks *prior* to a federal government takeover of these banks is thus retroactively cleansed of consequences.[12] The Eleventh Circuit's surprising and unprecedented disposition of this case thus raises serious policy questions that touch directly on the government's relationship with one of the most closely-regulated businesses in the United States, and the FDIC's rights as receiver for failed banks.[13] But the repercussions will not stop in the banking sphere: the entire relationship between the federal government's prerogatives and the rights of private litigants has been called into question, in a way that opens the door to judicial creation of "official immunity" for private entities in a host of hitherto-unknown circumstances.[14] The potential

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[12] If the Eleventh Circuit's rationale in this case is carried to its logical extent, the decision would mean that *the FDIC itself, as receiver,* would be barred from pursuing claims against private tortfeasors. The FDIC, when it acts as receiver for a failed bank, has only those rights against third parties that the bank itself would have had, and there is no legal principle that holds those rights to be somehow greater than those of the bank's parent holding company.

[13] If the Eleventh Circuit's decision is left undisturbed, the very haziness of the court's reasoning will engender a wave of litigation exploring the exact parameters of the broad "Southeast" federal common-law doctrine created in this case. Both the FDIC, in its capacity as the receiver for failed institutions, and the federal courts will be assailed by parties who seek protection from legal action on the theory that their torts or contractual breaches are immune under the Eleventh Circuit's new rule.

[14] The unsuitability of the adversary process as a vehicle for the enactment of such sweeping new rules of law is one of the most compelling rationales expressed by this Court in support of judicial restraint in federal common lawmaking:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of

(continued ...)

consequences of the Eleventh Circuit's doctrinally-insupportable decision cannot be overstated.

The protection of the carefully-drawn parameters of federal common lawmaking warrants the Court's consideration of this case. The *Erie* doctrine itself "is best understood as resting on principles of judicial federalism," under which the states are entitled to presume that their law "will govern all matters subject to state authority unless and until positive federal law is adopted to preempt such law." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,* 144 U. PA. L. REV. 1245, 1259, 1270 (1996). "[A] healthy balance of power" between the states and the federal government is critical to the protection of federalism because "[i]n the tension between federal and state power lies the promise of liberty." *United States v. Lopez,* — U.S. —, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring) (citation omitted).

This Court has not hesitated to grant certiorari to check the intemperate use of the federal common lawmaking power. *E.g., Parnell,* 352 U.S. at 32 (certiorari granted "[b]ecause the determination of the applicable law raised an important issue of federal-state relations"). It should do so here; the blunt tool created by the Eleventh Circuit will otherwise cut a wide swath across the judicial landscape, with federalist principles left the worse for it.

(... continued)

> investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives* * *.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. at 647.

CONCLUSION

The petition for a writ of certiorari should be granted.

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February 1997